

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROSALIN D. SUTTON)	Civil No. 11-0536-JLS (WVG)
)	
Plaintiff,)	REPORT AND RECOMMENDATION:
v.)	
)	DENYING PLAINTIFF'S MOTION
MICHAEL J. ASTRUE)	FOR SUMMARY JUDGMENT
)	(DOC. #15)
Defendant.)	
_____)	GRANTING DEFENDANT'S MOTION
)	FOR SUMMARY JUDGMENT
)	(DOC. #17)

I

INTRODUCTION

Plaintiff Rosalin D. Sutton (hereinafter "Plaintiff"), filed a Complaint for Judicial Review and Remedy On Administrative Decision under the Social Security Act [42 U.S.C. § 405(g)]. Defendant Michael J. Astrue (hereinafter "Defendant"), filed an Answer to the Complaint and the administrative record (hereafter "Tr."), pertaining to this case. Plaintiff has filed a Motion for Summary Judgment. Defendant has filed an Opposition to Plaintiff's Motion for Summary Judgment and a Cross-Motion for Summary Judgment.

1 The Court, having reviewed Plaintiff's Motion for Summary Judgment,
 2 Defendant's Opposition to Plaintiff's Motion for Summary Judgment,
 3 Defendant's Cross-Motion for Summary Judgment, and the administrative
 4 record filed by Defendant, hereby finds that Plaintiff is not entitled
 5 to the relief requested and therefore RECOMMENDS that Plaintiff's Motion
 6 for Summary Judgment be DENIED and Defendant's Motion for Summary
 7 Judgment be GRANTED.

8 II

9 PROCEDURAL HISTORY

10 On February 2, 2006, Plaintiff filed applications for Supplemental
 11 Security Income benefits and Disability Insurance Benefits, alleging
 12 that she was disabled since September 23, 2004. The Commissioner of
 13 Social Security denied her application initially and upon reconsidera-
 14 tion. On February 12, 2009, a hearing was held at which Plaintiff
 15 appeared with counsel and testified before an Administrative Law Judge
 16 ("ALJ"). On July 27, 2009, the ALJ found that Plaintiff was not
 17 disabled. The ALJ's decision became the final decision of the Commis-
 18 sioner of Social Security when the Appeals Council denied Plaintiff's
 19 request for review. (Tr. 1-3).

20 III

21 ALJ'S FINDINGS^{1/}

22 The ALJ made the following pertinent findings:

- 23 1. Plaintiff met the insured status requirements of the
 24 Social Security Act through December 31, 2004.
- 25 2. Plaintiff has not engaged in substantial gainful activity
 after her alleged onset date.
- 26 3. (Plaintiff) has the following severe impairment:
 27 seizures, status post-cerebral vascular accident.

28 ^{1/}The ALJ's findings are found at Tr. 16-21.

1 4. (Plaintiff) does not have an impairment or combination of
2 impairments that meets or medically equals one of the
3 listed impairments in 20 CFR Part 404, Subpart P,
4 Appendix 1. No physician has opined that (Plaintiff)'s
5 condition meets or equals any listing, and the state
6 agency physicians have opined that it does not.

7 5. After careful consideration of the entire record, the ALJ
8 finds that (Plaintiff) has the residual functional
9 capacity to perform the full range of light work.
10 (Plaintiff) could lift and carry twenty pounds occasion-
11 ally and ten pounds frequently due to having slight
12 weakness in her left upper extremity, stand and walk six
13 hours of an eight-hour workday and sit six hours of an
14 eight-hour workday. (Plaintiff) could stoop, bend,
15 reach, squat, kneel and crawl occasionally. (Plaintiff)
16 must avoid unprotected water, extreme heat, hazardous
17 machinery, driving and heights as defined in 20 CFR
18 404.1567(b) and 416.967(b).

19 In making this finding, the ALJ considered all symptoms
20 and the extent to which these symptoms can reasonably be
21 accepted as consistent with the objective medical
22 evidence and other evidence, based on the requirements of
23 20 CFR 404.1529 and 416.929 and SSRs 96-4p and 96-7p.
24 The ALJ also considered opinion evidence.

25 In considering (Plaintiff)'s symptoms, the ALJ must
26 follow a two-step process in which it must first be
27 determined whether there is an underlying medically
28 determinable physical or mental impairment that can be
shown by medically acceptable clinical and laboratory
diagnostic techniques—that could reasonably be expected
to produce (Plaintiff)'s pain or other symptoms.

Second, once an underlying physical or mental impairment
that could reasonably be expected to produce (Plaintiff)'s pain or other symptoms has been shown, the ALJ
must evaluate the intensity, persistence, and limiting
effects of (Plaintiff's) symptoms to determine the extent
to which they limit (Plaintiff's) ability to do basic
work activities. For this purpose, whenever statements
about the intensity, persistence, or functionally
limiting effects of pain or other symptoms are not
substantiated by objective medical evidence, the ALJ must
make a finding on the credibility of the statements based
on a consideration of the entire case record.

John R. Morse, M.D., a medical expert and board certified
internist, testified to his thorough review of the
medical records and (Plaintiff)'s testimony. Dr. Morse
testified (Plaintiff) has a history of seizures starting
in 2004. Dr. Morse testified (Plaintiff)'s seizures
became more frequent when she stopped being consistent
taking her medication. Dr. Morse testified the (Plaintiff)

1 tiff)'s seizures became controlled when she was consis-
2 tent taking her medication.

3 (Plaintiff) has a history of seizures, status post
4 cerebrovascular accident after she had hemorrhage to the
5 brain. On October 3, 2006, Sarah L. Maze, M.D., reported
6 (Plaintiff)'s first seizure occurred six months after her
7 stroke. Dr. Maze said (Plaintiff) was not taking her
8 seizure medication regularly when her last seizure
9 occurred. Because the cerebrovascular accident caused
10 (Plaintiff) to have very slight weakness in the left
11 upper extremity, Dr. Maze performed a physical examina-
12 tion and determined an assistive device was not required.
13 (Plaintiff)'s reflexes and gait was (sic) normal.

14 On January 29, 2007. The University of Southern Califor-
15 nia Medical Center (sic) (University of California San
16 Diego) (UCSD) reported the results of cranial nerve
17 testing (which) revealed (Plaintiff)'s nerves were
18 intact. (Plaintiff) had normal shoulder shrug bilater-
19 ally. The results of the motor test revealed (Plaintiff)
20 had a normal bulk and tone in all four extremities.
21 (Plaintiff) had a full range of motion in all muscle
22 groups in her upper extremities. Although she had some
23 pain in her elbow, x-rays showed no discoloration or
24 joint effusion in the elbow.

25 In August 2007, (Plaintiff) was doing well since taking
26 Keppra.^{2/} In October 2007, (Plaintiff) was taking good
27 care of herself. (Plaintiff) had good control of her
28 gout and she had no seizures for a while. (Plaintiff)
was walking for exercise, drinking a lot of water and she
was eating smaller meals. On July 24, 2008, treatment
records from Mid-City Community Clinic reported (Plain-
tiff) had her last seizure in August 2007. On September
18, 2008, treatment records from Mid-City Community
Clinic reported (Plaintiff) was off her medications for
six months.

After careful consideration of the evidence, the (ALJ)
finds that (Plaintiff)'s medically determinable impair-
ment could reasonably be expected to cause the alleged
symptoms; however, (Plaintiff)'s statements concerning
the intensity, persistence and limiting effects of these
symptoms are not credible to the extent they are incon-
sistent with the above residual functional capacity
assessment.

However, to the extent that it is alleged that (Plain-
tiff) cannot perform work at an (sic) light exertional

^{2/} Keppra (Levetiracetam) is used in combination with other medications to
treat certain types of seizures in people with epilepsy. NATIONAL CENTER FOR
BIOTECHNOLOGY INFORMATION, U.S. LIBRARY OF MEDICINE,
www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001067.

1 level, the ALJ finds those allegations are not totally
2 credible for the following clear and convincing reasons.

3 First, (Plaintiff) is able to perform activities of daily
4 living such as her personal hygiene, washing dishes,
5 vacuuming, light cooking, laundry and she takes care of
6 her finances.

7 Second, (Plaintiff) said she was not sure of her compli-
8 ance with her medication. She reported compliance with
9 Dilantin^{3/} for one year and her seizures stopped. When
10 she was non-compliant with Dilantin she ended up in the
11 emergency room. (Plaintiff) started back taking her
12 medication after she was admitted into the hospital with
13 a seizure.

14 Third, two days after her last visit to the emergency
15 room for non-compliance with her medication, she had
16 another seizure for non-compliance and was back in the
17 emergency room. Dr. Maze reported on October 3, 2006,
18 (Plaintiff's) seizures are under control when she takes
19 her medication regularly.

20 Fourth, treatment records from UCSD Medical Center reveal
21 (Plaintiff) was instructed to keep a seizure diary and
22 return with it two months later to alter her anti-seizure
23 therapy.

24 Fifth, in August 2007, (Plaintiff) was doing well since
25 taking Keppra.

26 Sixth, in October 2007, (Plaintiff) had good control of
27 her gout and she had no seizures for a while.

28 Seventh, on September 18, 2008, treatment records from
Mid-City Community Clinic reported (Plaintiff) was off
her medications for six months.

Consequently, (Plaintiff's) allegations are not credible
to establish a more restrictive residual functional
capacity than that found above.

Alan E. Cummings, Ph.D., a vocation expert testified to
his thorough review of the vocational records. At the
hearing, the vocation expert classified (Plaintiff)'s
past relevant work as a day care worker as semi-skilled

^{3/}Dilantin (Phenytonin) is used to control certain types of seizures, and to
treat and prevent seizures that may begin during or after surgery to the brain or
nervous system. NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, U.S. LIBRARY OF MEDICINE,
www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000549.

work performed at a light level of exertion, and a sandwich maker as unskilled work performed at the medium level of exertion according to the Dictionary of Occupational Titles. Dr. Cummings then considered a question involving a hypothetical individual with (Plaintiff's) testimony and past relevant work experience. He replied that such an individual is not able to perform her past relevant work.

6. (Plaintiff) is unable to perform her past relevant work as a day care worker and as a sandwich maker because her potential for a seizure would jeopardize both jobs. Accordingly, (Plaintiff) is unable to perform past relevant work.
7. (Plaintiff) was born on November 16, 1957 and was 46 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date.
8. (Plaintiff) has at least a high school education and is able to communicate in English.
9. Transferability of job skills is not material to the determination of disability because applying the Medical-Vocational Rules directly supports a finding of "not disabled," whether or not (Plaintiff) has transferable job skills.
10. Considering (Plaintiff's) age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that (Plaintiff) can perform.

In determining whether a successful adjustment to other work can be made, the undersigned must consider (Plaintiff)'s residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocation Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If (Plaintiff) can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon (Plaintiff)'s specific vocational profile. When (Plaintiff) cannot perform substantially all of the exertional demands at a given level of exertion and/or has nonexertional limitations, the medical-vocational rules are used as a framework for the additional exertional and/or nonexertional limitations. If (Plaintiff) has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provides a framework for decisionmaking.

If (Plaintiff) had the residual functional capacity to perform the full range of light work, a finding of "not disabled" would be directed by Medical-Vocational Rule 202.21. However, (Plaintiff)'s ability to perform all or

1 substantially all of the requirements of this level of
 2 work has been impeded by additional limitations. To
 3 determine the extent to which these limitation erode the
 4 unskilled light occupational base, the ALJ asked the
 5 vocational expert whether jobs exist in the national
 6 economy for an individual with (Plaintiff)'s age,
 7 education, work experience, and residual functional
 8 capacity. The vocational expert testified that given all
 9 of these factors the individual would be able to perform
 10 the requirements of representative occupations such as an
 assembler, DOT No. 731.687-034, classified as unskilled,
 light exertional level with 2,000 in the local economy
 and 60,000 in the national economy, a (sic) inspector,
 DOT No. 727.687-066, unskilled, light exertional level
 with 3,000 in the local economy and 92,000 in the
 regional economy and a packager, DOT No. 559.687-074,
 classified as unskilled, light exertional level with
 4,000 in the local economy and 442,000 in the regional
 economy.

11 Pursuant to SSR 00-4p, the vocational expert stated his
 12 testimony was based upon and consistent with the informa-
 tion contained in the Dictionary of Occupational Titles.

13 Based on the testimony of the vocational expert, the
 14 (ALJ) concludes that, considering (Plaintiff's) age,
 15 education, work experience, and residual functional
 16 capacity, (she) is capable of making a successful
 adjustment to other work that exists in significant
 numbers in the national economy. A finding of "not
 17 disabled" is therefore appropriate under the framework of
 the above-cited rule (sic).

- 18 11. (Plaintiff) has not been under a disability, as defined
 19 in the Social Security Act, from September 23, 2004
 through the date of this decision.

20 IV

21 STANDARD OF REVIEW

22 A district court may only disturb the Commissioner's final decision
 23 "if it is based on legal error or if the fact findings are not supported
 24 by substantial evidence." Sprague v. Bowen, 812 F.2d 1226, 1229 (9th
 25 Cir. 1987); see Villa v. Heckler, 797 F.2d 794, 796 (9th Cir. 1986).
 26 The court cannot affirm the Commissioner's final decision simply by
 27 isolating a certain amount of supporting evidence. Rather, the court
 28 must examine the administrative record as a whole. Gonzalez v.

1 Sullivan, 914 F.2d 1197, 1200 (9th Cir. 1990). Yet, the Commissioner's
 2 findings are not subject to reversal because substantial evidence exists
 3 in the record to support a different conclusion. See, e.g., Mullen v.
 4 Brown, 800 F.2d 535, 545 (6th Cir. 1986). "Substantial evidence,
 5 considering the entire record, is relevant evidence which a reasonable
 6 person might accept as adequate to support a conclusion." Matthews v.
 7 Shalala, 10 F.3d 678, 679 (9th Cir. 1993); see Thompson v. Schweiker,
 8 665 F.2d 936, 939 (9th Cir. 1982). The Commissioner's decision must be
 9 set aside, even if supported by substantial evidence, if improper legal
 10 standards were applied in reaching that decision. See e.g., Benitez v.
 11 Califano, 573 F.2d 653, 655 (9th Cir. 1978).

12 V

13 SUMMARY OF APPLICABLE LAW

14 Title II of the Social Security Act (hereinafter, "Act"), as
 15 amended, provides for the payment of insurance benefits to persons who
 16 have contributed to the program and who suffer from physical or mental
 17 disability. 42 U.S.C. § 423(a)(1)(D). Title XVI of the Act provides
 18 for the payment of disability benefits to indigent persons under the
 19 Supplemental Security Income (SSI) program. § 1382(a). Both titles for
 20 the Act define "disability" as the "inability to engage in any substan-
 21 tial gainful activity by reason of any medically determinable physical
 22 or mental impairment which can be expected to last for a continuous
 23 period of not less than 12 months..." Id. The Act further provides that
 24 an individual:

25 ... shall be determined to be under a disability only if his
 26 physical or mental impairment or impairments are of such
 27 severity that he is not only unable to do his previous work
 28 but cannot, considering his age, education, and work experi-
 ence, engage in any other kind of substantial gainful work
 which exists in the national economy, regardless of whether
 such work exists in the immediate area in which he lives, or

1 whether a specific job vacancy exists for him, or whether he
2 would be hired if he applied for work. 42 U.S.C. §
423(d) (2) (a).

3 The Secretary of the Social Security Administration has established
4 a five-step sequential evaluation process for determining whether a
5 person is disabled. 20 C.F.R. §§ 404.1520, 416.920.

6 Step one determines whether the claimant is engaged in "substantial
7 gainful activity." If he is, disability benefits are denied. 20 C.F.R.
8 §§ 404.1520(b), 416.920(b). If he is not, the decision maker proceeds
9 to step two.

10 Step two determines whether the claimant has a medically severe
11 impairment or combination of impairments. That determination is
12 governed by the "severity regulation," which provides in relevant part:

13 If you do not have any impairment or combination of impair-
14 ments which significantly limits your physical or mental
15 ability to do basic work activities, we will find that you do
16 not have a severe impairment and are, therefore, not disabled.
We will not consider your age, education, and work experience.
§§ 404.1520(c), 416.920(c).

17 The ability to do basic work activities is defined as "the
18 abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§
19 404.1521(b), 416.921(b). Such abilities and aptitudes include
20 "[p]hysical functions such as walking, standing, sitting, lifting,
21 pushing, pulling, reaching, carrying, or handling; "[c]apacities for
22 seeing, hearing, and speaking;" "[u]nderstanding, carrying out, and
23 remembering simple instructions;" "[u]se of judgment;" "[r]esponding
24 appropriately to supervision, co-workers, and usual work situations;"
25 and "[d]ealing with changes in a routine work setting." Id. If the
26 claimant does not have a severe impairment or combination of impair-
27 ments, the disability claim is denied. If the impairment is severe, the
28 evaluation proceeds to step three.

1 Step three determines whether the impairment is equivalent to one
2 of a number of listed impairments that the secretary acknowledges are so
3 severe as to preclude substantial gainful activity. 20 C.F.R. §§
4 404.1520(d), 416.920(d). If the impairments meets or equals one of the
5 listed impairments, the claimant is conclusively presumed to be
6 disabled. If the impairment is not one that is conclusively presumed to
7 be disabling, the evaluation proceeds to step four.

8 Step four determines whether the impairments prevent the claimant
9 from performing work he has performed in the past. If the claimant is
10 able to perform his previous work, he is not disabled. 20 C.F.R. §§
11 404.1520(e), 416.920(e). If the claimant cannot perform his previous
12 work, the evaluation proceeds to step five.

13 Step five, the final step of the process, determines whether he is
14 able to perform other work in the national economy in view of his age,
15 education, and work experience. The claimant is entitled to disability
16 benefits only if he is not able to perform other work. 20 C.F.R. §§
17 404.1520(f), 416.920(f).

18 VI

19 DISCUSSION

20 A. THE ALJ PROVIDED LEGALLY SUFFICIENT REASONS FOR REJECTING 21 PLAINTIFF'S TESTIMONY

22 Plaintiff argues that the ALJ improperly assessed her subjective
23 symptoms and failed to articulate clear and convincing reasons for
24 rejecting her testimony. Defendant contends that the ALJ provided
25 sufficient reasons for rejecting the Plaintiff's claims.

26 An ALJ must consider all of a claimant's statements about symptoms
27 including pain, but such statements are not alone conclusive evidence of
28 disability. 20 C.F.R. §§ 404.1529(a) and 416.929(a) (2012). An ALJ
cannot be required to believe every allegation of disability; but is

1 however, required to make specific credibility findings. See Fair v.
2 Bowen, 885 F. 2d 597 (9th Cir. 1989); See also Social Security Ruling
3 (SSR) 96-7p (credibility finding "must be sufficiently specific to make
4 clear to the individual and to any subsequent reviewers the weights the
5 adjudicator gave to the individual's statements and the reason for that
6 weight"). An ALJ's credibility finding must be properly supported by
7 the record and sufficiently specific to ensure a reviewing court that he
8 did not "arbitrarily discredit" a claimant's subjective testimony. See
9 Thomas v. Barnhart, 278 F. 3d 947, 958 (9th Cir. 2002).

10 Here, Plaintiff testified that she has trouble standing, that she
11 has seizures in her sleep, uses a walker, and needs assistance while
12 showering (Tr. 28-29). However, the ALJ noted that Plaintiff performed
13 numerous daily activities, including taking care of personal hygiene,
14 washing dishes, sweeping, light cooking, and doing laundry (Tr. 18).
15 The ALJ observed that these activities belied Plaintiff's claim that she
16 could not perform light work activity (Tr. 18). See Tommasetti v.
17 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that an ALJ may
18 consider many factors in weighing a social security claimant's credibil-
19 ity, including the claimant's daily activities). The ALJ properly
20 inferred that because Plaintiff could sweep, do laundry, and wash
21 dishes, she could perform light work activity (Tr. 18).

22 Plaintiff's claim for disability benefits is further weakened by
23 her non-compliance with prescribed medication (Tr. 18). The ALJ noted
24 that when Plaintiff was non-compliant with her prescribed treatment, she
25 ended up in the emergency room (Tr. 18). The ALJ further noted that a
26 consultative examiner reported on October 2, 2006, that Plaintiff's
27 seizures were under control when she took her medication regularly, and
28 that in August 2007, Plaintiff was doing well since taking Keppra (Tr.

18). Impairments that are amenable to control cannot be a basis for disability. Warre v. Commissioner of Social Security Administration, 439 F.3d 1001, 1006 (9th Cir. 2006), citing Odle v. Heckler, 707 F.2d 439, 440 (9th Cir. 1983) (affirming a denial of benefits and noting that the claimant's impairments were responsive to medication).

Since an ALJ may disregard unsupported, self-serving statements, and due to Plaintiff's activities of daily living, Plaintiff's non-compliance with prescribed medication, despite the medication's positive effect, the ALJ properly found that Plaintiff's alleged impairments were not as severe as alleged.

B. THE ALJ ERRED IN FAILING TO REJECT OR CONSIDER LAY WITNESS TESTIMONIAL EVIDENCE, BUT THE ERROR WAS HARMLESS.

Plaintiff argues that the ALJ erred in ignoring the testimony of the Plaintiff's mother, Dorothy Evans ("Evans"). Defendant contends that even if the ALJ erred, such error was harmless.

Ms. Evans briefly testified that her daughter had seizures but had difficulty recalling when the seizures had occurred (Tr. 53). She asserted that Plaintiff had seizures which occurred during her sleep; however, she had never witnessed this and only based her testimony on hearsay statements from Plaintiff (Tr. 52-53). She also asserted that Plaintiff had a memory problem (Tr. 50-51).

Generally, in evaluating a claimant's disability, the ALJ must consider the testimony of lay witnesses. Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993); see also Social Security Ruling (SSR) 96-8p (ALJ must consider the record as a whole including lay evidence). Particularly in cases where a claimant alleges pain or other symptoms that are not supported by medical evidence in the file, the ALJ must obtain detailed descriptions of daily activities by directing specific

1 inquiries about the pain and its effects to third parties who would be
2 likely to have such knowledge. Dodrill, 12 F.3d at 919.

3 The ALJ did not offer any reason to disregard Dorothy Evans'
4 description of Plaintiff's limitations. In fact, the ALJ's decision is
5 void of any statements that the ALJ actually considered Ms. Evans'
6 testimony. Such failure to articulate a rationale is error. However,
7 this Court disagrees with the Plaintiff that such error warrants remand.

8 The Ninth Circuit has held that an ALJ's failure to address a lay
9 witness's statements was harmless error and did not warrant remand.
10 Ukolov v. Barnhart, 420 F.3d 1002, 1006 fn. 6 (9th Cir. 2005) ("Because
11 the testimony of the lay witnesses encompassed only symptoms, any
12 failure of the ALJ to adequately address that testimony does not affect
13 the outcome of this case"). A reviewing court can consider an error
14 harmless when an ALJ fails to properly discuss competent lay testimony
15 favorable to the claimant when it can confidently conclude that no
16 reasonable ALJ, when fully crediting the testimony, could have reached
17 a different disability determination. See Stout v. Commissioner, 454
18 F.3d 1050, 1053-56 (9th Cir. 2006). Friends and family members who are
19 in a position to observe the claimant's symptoms daily are considered to
20 be "competent" to testify to the claimant's condition. Dodrill, F.3d at
21 918.

22 In the present case, Evans' testimony was inconsistent with the
23 treatment reflected in Plaintiff's medical record and the effectiveness
24 of treatment when Plaintiff was compliant with her medications. Evans
25 testified that her daughter needed help because of a mental impairment
26 (Tr. 50-51), which is the primary impairment Plaintiff alleges prevents
27 her from working (Tr. 39). However, Plaintiff did not provide objective
28 medical evidence of her alleged mental impairment. When Plaintiff was

1 asked by the ALJ why she believed her memory was more impaired than it
2 was previously, Plaintiff responded it was because of her stroke (Tr.
3 39). However, Plaintiff's stroke occurred in 2002, prior to the ALJ
4 determination in 2004 that she was not disabled (Tr. 63). Neither
5 Plaintiff nor Evans alleged an intervening stroke or other event that
6 would cause Plaintiff's memory to deteriorate further. Indeed,
7 according to the medical records, Plaintiff's mental status had actually
8 improved from a limitation to simple, repetitive work, to no medically
9 determinable impairment. (Tr. 76, 336). In short, there was no
10 evidence to support Evans' testimony, nor Plaintiff's testimony, that
11 Plaintiff was disabled because of poor memory. Accordingly, Evans'
12 testimony was unsupported. Therefore, Plaintiff's contention that the
13 case warrants remand because the ALJ failed to discuss the Evans'
14 testimony fails.

15 Accordingly, the Court RECOMMENDS that Plaintiff's Motion for
16 Summary Judgment be DENIED and Defendant's Motion for Summary Judgment
17 be GRANTED.

18 VII

19 CONCLUSION AND RECOMMENDATION

20 After a review of the record in this matter, the undersigned
21 Magistrate Judge RECOMMENDS that Plaintiff's Motion for Summary Judgment
22 be DENIED and Defendant's Motion for Summary Judgment be GRANTED.

23 This Report and Recommendation of the undersigned Magistrate Judge
24 is submitted to the United States District Judge assigned to this case,
25 pursuant to the provision of 28 U.S.C. § 636(b)(1).

26 IT IS ORDERED that no later than March 26, 2012, any party to this
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1 action may file written objections with the Court and serve a copy
2 on all parties. The document should be captioned "Objections to Report
3 and Recommendation."

4 IT IS FURTHER ORDERED that any reply to the objections shall be
5 filed with the Court and served on all parties no later than April 13,
6 2012. The parties are advised that failure to file objections within
7 the specified time may waive the right to raise those objections on
8 appeal of the court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
9 1991).

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13 DATED: February 27, 2012

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16 Hon. William V. Gallo
17 U.S. Magistrate Judge
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